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20
21 **UNITED STATES DISTRICT COURT**
22
23 **NORTHERN DISTRICT OF CALIFORNIA**

24 DEMETRIC DI-AZ, OWEN DIAZ, and
25 LAMAR PATTERSON,

26 Plaintiffs,

27 v.

28 TESLA, INC. dba TESLA MOTORS, INC.;
CITISTAFF SOLUTIONS, INC.; WEST
VALLEY STAFFING GROUP;
CHARTWELL STAFFING SERVICES, INC.;
and DOES 1-50, inclusive,

Defendants.

Case No. 3:17-cv-06748-WHO

PLAINTIFF OWEN DIAZ'S ISSUE
BRIEF REGARDING ADMISSIBILITY
OF KEVIN MCGINN'S TESTIMONY

Trial date: September 27, 2021
Complaint filed: October 16, 2017

1 **I. INTRODUCTION**

2 Former Defendant NextSource, Inc. (“NextSource”) designated Kevin McGinn as the
 3 person most knowledgeable to testify on certain subject matters in this action. *See* Dkt. No. 238.
 4 NextSource served objections prior to the deposition. *See* Exhibit 1 to Declaration of Lawrence
 5 A. Organ (“Organ Decl.”) filed concurrently herewith. And Plaintiff took McGinn’s deposition
 6 on June 17, 2019. Organ Decl. at ¶ 5.

7 Defendant Tesla, Inc. (“Tesla”) seeks to exclude portions of McGinn’s deposition
 8 testimony designated by Plaintiff for use at trial as more prejudicial than probative under Federal
 9 Rule of Evidence 403. Dkt. No. 238. It relies, in part, on NextSource’s objections to the notice –
 10 objections on which this Court has not yet ruled but are nevertheless without merit. The same is
 11 true of Tesla’s claim of undue prejudice. The designated testimony is relevant, not excludable by
 12 NextSource’s objections, and will take minimal time to present to the jury. Therefore, the Court
 13 should overrule Tesla’s objections and permit Plaintiff to present the designated portions of
 14 McGinn’s deposition testimony.

15 **II. ARGUMENT**

16 Relevant evidence is presumptively admissible. *See* Fed. R. Evid. 401 and 402. Such
 17 evidence may be excluded “if its probative value is substantially outweighed by a danger of one
 18 or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue
 19 delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. No such
 20 danger exists here.

21 **A. Designation 6**

22 Designation 6 consists of the following excerpt of McGinn’s testimony:

23 Q. So looking at Exhibit 166, you’ve been designated as the person most
 24 knowledgeable on Topic 1, the contractual relationship between Defendant and
 25 Tesla, Inc.; is that true, subject to your objections?

26 A. Yes.

27 Q. And you’ve also been designated as the person most knowledgeable on the
 28 second topic, the contractual relationship between Defendant and CitiStaff
 Solutions, Inc., subject to your objections; is that correct?

A. Yes.

Dkt. No 238. This background is relevant to the jury’s understanding of McGinn’s testimony. It

1 informs the jury that McGinn testified on NextSource's behalf.

2 Without providing a legal basis, Tesla argues that this testimony is unduly prejudicial
 3 because it "was only provided subject to [NextSource's] objections" and "does not reflect" those
 4 objections. Dkt. No. 238. Plaintiff is unaware of any authority supporting Tesla's position. The
 5 mere fact that a former party has objected to a deposition notice does not mean that testimony
 6 obtained by way of the noticed deposition is unduly prejudicial. Indeed, the purpose of stating an
 7 objection is to preserve it so that the Court may subsequently rule on it. This Court has not
 8 sustained any of NextSource's objections to the deposition notice. It would be inappropriate to
 9 exclude McGinn's testimony on their basis.

10 Moreover, none of NextSource's objections – objections Tesla did not make – warrant
 11 the exclusion of McGinn's testimony. NextSource raised the same three objections to Topics 1
 12 and 2, specifically: (1) the term "contractual relationship" was vague, ambiguous, and uncertain;
 13 (2) the category of examination seeks confidential, proprietary, or trade secret information; and
 14 (3) the subject matter was not limited in time and scope. Exhibit 1 to Organ Decl. Still,
 15 NextSource agreed to produce its person most knowledgeable, McGinn, as to the general nature
 16 of the relationship between NextSource, on one hand, and Tesla and CitiStaff Solutions, Inc.
 17 ("CitiStaff"), respectively on the other. *Id.* None of NextSource's objections merit the exclusion
 18 of the testimony in Designation 6. First, McGinn understood the term "contractual relationship"
 19 – a term that is commonly used and understood among chief officers of organizations – well
 20 enough to testify about it. Second, nothing in this testimony reveals confidential, proprietary, or
 21 trade secret information. Third, McGinn agreed that he was the person most knowledgeable
 22 about these topics at the time of his deposition. His testimony makes clear that his knowledge
 23 was based on his role as NextSource's Chief Financial Officer from October 2015 to the date of
 24 his deposition, which encompasses the relevant time period in this action.

25 NextSource's objections do not warrant the exclusion of McGinn's testimony. Nor does
 26 Tesla's reliance on them.

27 **B. Designation 13**

28 Designation 13 contains the following excerpt of McGinn's testimony:

1 Q. But in terms of your suppliers, the companies like CitiStaff and Chartwell,
2 they're essentially just providing employees to Tesla to work in Tesla's factory, is
3 that correct?

4 MR. GELLER: Misstates his testimony. Objection to the form.

5 MS. SWAFFORD-HARRIS: And calls for speculation.

6 THE WITNESS: The supplier will, in the course of their employment of the
7 worker, will recruit, onboard, and pay the worker. They place that worker at the
8 Tesla site, who then works under the day-to-day direction and control of Tesla.

9 Dkt. No. 238. This testimony tends to show that Tesla was Plaintiff's joint employer under the
10 control test set forth in *E.E.O.C. v. Global Horizons, Inc.*, 915 F.3d 631, 637 (9th Cir. 2019), for
11 Plaintiff's claim under 42 U.S.C. § 1981. The probative value is heightened here because
12 McGinn testified on behalf of NextSource.

13 Contrary to Tesla's objection, the testimony in Designation 13 is not cumulative. It is the
14 only designated testimony from McGinn that provides a factual basis for a finding that Tesla
15 directed and controlled the day-to-day work of CitiStaff employees, like Plaintiff. Dkt. No. 238.
16 The only other designation that discusses Tesla's right to control contract workers is Designation
17 4, which relates to NextSource associates. *Id.* Nor would its admission waste time or cause undue
18 delay. The testimony is useful to the jury's determination of whether Tesla was Plaintiff's joint
19 employer, and it would only take a minute to read the testimony into the record.

20 Accordingly, there is no danger, much less substantial danger, that the testimony would
21 cause undue delay, waste time, or be needlessly cumulative. The Court should allow the
22 admission of this probative evidence.

23 **III. CONCLUSION**

24 McGinn's designated testimony is relevant. Its probative value is not substantially
25 outweighed by a danger that it would be unfairly prejudicial, cause unduly delay, waste time, or
26 be needlessly cumulative. Therefore, it is admissible.

27 DATED: September 26, 2021 By: /s/ Lawrence A. Organ
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